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Michael N. Milby, Clerk of Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES
LITIGATION

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MDL Docket No. 1446

This Document Relates To:

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MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

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Civil Action No. H-01-3624
(Consolidated)

Plaintiffs,

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CLASS ACTION

vs.

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ENRON CORP., et al.

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Defendants.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al., Individually and on Behalf
of All Others Similarly Situated,

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Plaintiffs,

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vs.

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KENNETH L. LAY, et al.,

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Defendants.

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PAMELA M. TITTLE,

Plaintiffs,

VS.

ENRON CORPORATION, et al.,

Defendants.

Civil Action No. H-01-3913

OFFICIAL COMMITTEE OF UNSECURED
CREDITORS OF ENRON CORP.,

Plaintiffs,

VS.

ANDREW S. FASTOW, MICHAEL J. KOPPER,
BEN GLISAN, JR. RICHARD B. BUY,
RICHARD A. CAUSEY, JEFFREY K.
KILLING, KENNETH L. LAY, JEFFREY
McMAHON, JAMES V. DERRICK, JR.,
KRISTINA M. MORDAUNT, KATHY LYNN,
ANNE YEAGER-PATEL, ARTHUR
ANDERSEN, LLP, AND CARL FASTOW, AS
ADMINISTRATOR OF THE FASTOW FAMILY
FOUNDATION,

Defendants.

Civil Action No. H-04-0091

[Caption continued on next page]

ELAINE L. CHAO, SECRETARY OF THE
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff,

vs.

ENRON CORPORATION, et al.,

Defendants.

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Civil Action No. H-03-2257
(Consolidated with H-01-3913)

**CERTAIN DEFENDANTS' REPLY TO CERTAIN PRIVATE ACTION
PLAINTIFFS' OPPOSITION TO MOTION TO CLARIFY THE MARCH 11, 2004
SCHEDULING ORDER WITH RESPECT TO THIRD-PARTY COMPLAINTS
AND CROSS-CLAIMS IN ACTIONS NOT PROCEEDING UNDER THE
CONSOLIDATED NEWBY AND TITTLE COMPLAINTS**

Defendants John A. Urquhart, Rebecca Mark-Jusbache, Robert A. Belfer, Norman P. Blake, Jr., Ronnie C. Chan, John H. Duncan, Joe H. Foy, Wendy L. Gramm, Robert K. Jaedicke, Charles A. LeMaistre, John Mendelsohn, Jerome Meyer, Frank Savage, Charls E. Walker, John Wakeham, Herbert Winokur, Jr., Richard B. Buy, Richard A. Causey, Mark A. Frevert, Steven J. Kean, Mark E. Koenig, Jeffrey McMahon, Cindy K. Olson, Kenneth D. Rice, Lawrence Greg Whalley, and Bruce G. Willison¹ ("Certain Defendants"), who previously joined in the Bank Defendants' Motion to Clarify the March 11, 2004 Scheduling Order, now file this Reply to the Opposition of Certain Private Action Plaintiffs (hereinafter "Certain Private Action Plaintiffs' Opposition" or simply "Opposition"), and these Certain Defendants respectfully reiterate their request that this Court clarify that the August 2, 2004 deadline for the joinder of new parties or the filing of third-party or cross-complaints/claims set forth in the March 11, 2004 Scheduling

¹ Mr. Willison joins in this Reply only as it relates to the consolidated, related and coordinated cases not currently proceeding under the controlling *Newby* and *Tittle* consolidated complaints.

Order does **not** apply to the coordinated, consolidated and related cases not currently proceeding under the controlling *Newby* and *Tittle* consolidated complaints (“Coordinated/Consolidated/Related Cases”).

INTRODUCTION

On July 16, 2004, the Bank Defendants filed their Motion to Clarify the March 11, 2004, Scheduling Order to eliminate any “doubt” or “suggestion” that the deadline for joinder of new parties and the filing of third-party or cross-complaints/claims referred to in the Scheduling Order applies only to the *Newby* and *Tittle* consolidated complaints and not to the Coordinated/Consolidated/Related Cases. On July 23, 2004, Certain Defendants joined in this seemingly uncontroversial motion for clarification, and on the same date, Certain Private Action Plaintiffs’ Opposition was filed.² That opposition offers three, hollow arguments for denying the motion for clarification: 1) the purported plain language of the March 11 Order; 2) an unexplained allegation of disruption of the “process of coordination”; and 3) alleged

² Also on July 23, 2004, Lead Plaintiff filed its Response to the Banks’ Motion to Clarify and stated it has “no opposition” to the clarification, so long as a form of order is entered specifying a deadline for joinder of new parties or to file third-party or cross-claims as follows: “In each action not proceeding under the consolidated *Newby* and *Tittle* complaints, the later of Monday, August 2, 2004 or 30 days after the party files its Answer.” Lead Plaintiff’s proposed form of Order differs from the proposed order submitted by the Banks, which provides for the following deadline in pertinent part: “In each action, the later of Monday, August 2, 2004 or 30 days after the party files its Answer.”

We urge the Court not to enter either of these proposed forms of order, but instead to enter the form of Order accompanying this Reply. Our proposed order, like the Court’s Scheduling Orders to which it relates, does not predicate the joinder of new parties or assertion of third-party or cross-claims on whether or not answers have been filed. Instead, as we pointed out in our joinder in the Banks’ Motion, the Court has stayed further pleadings until its ruling on class certification and the private parties’ election on whether or not to proceed under the consolidated amended complaint in *Newby* and *Tittle*. Because the stay applies with equal force to all Coordinated/Consolidated/Related Cases under the Court’s Orders of July 11, 2003, and March 11, 2004, there is no reasonable basis to differentiate the cases based on whether a particular defendant may have filed an answer or responsive pleading in a given case.

protectionism for as-yet-unjoined parties who, if joined, allegedly would be forced to “catch-up” with others who already have been participating in discovery. None of these arguments warrants the imposition of a pleading deadline that appears to be neither in keeping with the intent or the purpose of the Court’s Scheduling Orders of March 11, 2004, and July 11, 2003.

The plain language of the March 11 Order does not support the result urged in Certain Private Action Plaintiffs’ Opposition; instead, the only logical reading of that language is that the deadlines imposed on the Consolidated/Coordinated/Related cases by the March 11 Order relate specifically to *discovery* and not pleading requirements. This interpretation is the only way for the March 11 Order to be internally consistent, as well as to harmonize that Scheduling Order with the July 11, 2003 Scheduling Order to which the March 11 Order refers. Far from disrupting the process of coordination, reading the March 11 Order in this straightforward manner—rather than the superficial and fragmented approach urged in the Opposition—will promote the fundamental principles of coordination and efficiency that the Court has articulated. Finally, remaining true to the Court’s announced intention of staying the filing of new pleadings and claims in the Consolidated/Related/Coordinated Cases will not, as the Opposition argues, “severely prejudice” newly-joined parties, but rather will foster the “systematic, nonduplicative, coordinated discovery” that the Court has mandated (July 11 Order at 3), while at the same time permitting counsel for the Plaintiffs in the Consolidated/Related/Coordinated Cases to evaluate the need for or desirability of proceeding independently of *Newby* and *Tittle* at all, in light of the ongoing discovery. Forcing decisions at this juncture concerning the addition of claims and parties that may prove to be unnecessary in light of Plaintiffs’ potential decisions to proceed under the consolidated amended complaint in *Newby* or *Tittle* is both illogical and potentially harmful to currently un-joined parties. Whether and against whom to assert third-party or cross-

claims likely will be affected by the decisions of the Consolidated/Coordinated Plaintiffs on how they intend to proceed. Requiring the assertion of third-party claims or cross-claims prematurely potentially would introduce unnecessary issues into this already-complex assortment of parties and interests and could operate to hinder a more efficient, cost-effective and orderly progression of discovery and the litigation generally.

I. THE PLAIN LANGUAGE OF THE MARCH 11 ORDER DOES NOT IMPOSE A PLEADING DEADLINE OF AUGUST 2, 2004, FOR JOINDER OR THIRD-PARTY COMPLAINTS/CROSS-CLAIMS IN NON-*NEWBY* OR *TITTLE* CASES.

The March 11 Order plainly distinguishes between *Newby* and *Tittle* on the one hand and the Consolidated/Coordinated/Related cases on the other. With respect to the former, the Scheduling Order establishes the calendar for both discovery and other key events in the litigation, including trial, while the Court specifies that the March 11 Order applies to the “consolidated and coordinated cases for *discovery purposes*.” (March 11 Order at 1; emphasis added). Unfortunately, the Order omits the reference to *Newby* and *Tittle* in the line entry for joining new parties or filing a third-party complaint or cross-complaint/claims. That this omission was inadvertent is evident from the Order’s precise reference to scheduling for the Consolidated/Coordinated/Related cases: “As to consolidated, related and coordinated cases not currently proceeding under the controlling *Newby* and *Tittle* consolidated complaints, the Court’s ruling in Part I of the July 11, 2003 Scheduling Order will govern the schedule for those cases.” (March 11 Order at 2).

Part I of the July 11 Order in turn provides that the Consolidated/Related/Coordinated cases “shall be stayed as to the filing of amended pleadings and/or responsive pleadings until the motions for class certification in *Newby* and *Tittle* are resolved by the Court, but that discovery may proceed.” (July 11 Order at ¶ I.B). The July 11 Order also sets forth the procedure for the

private plaintiffs’ post-certification election either to dismiss their own complaints and proceed under *Newby* or *Tittle* or to proceed under their own petitions/complaints or request leave to amend. Additionally, the July 11 Order clearly specifies that “Defendants shall file any amended responsive pleadings within 30 days of the filing of such an amended complaint.” (July 11 Order at ¶ I.D).

Thus, if as the Opposition suggests, the line entry for joinder and third-party claims and cross-claims in the March 11 Order is stripped from the balance of that Order and isolated from Part I of the July 11 Order, the procedural mechanism that the Court installed to distinguish the private actions from *Newby* and *Tittle* while still accommodating the coordination of essential discovery in both categories of cases, will be undermined. The Opposition’s superficial reading of the March 11 Order is inconsistent with the entire tenor of that Scheduling Order, as well as Part I of the July 11, 2003 Order on which the March Order continues to depend. The only way to harmonize the two Orders and to give meaningful effect to the Court’s procedural demarcation between the private actions and *Newby/Tittle*, is to recognize that the filing of all amended and responsive pleadings—including any joinders of new parties or third-party complaints or cross-claims—is stayed in the private actions until the Court’s ruling on class certification.

II. COUPLING ANY JOINDERS AND THIRD-PARTY CLAIMS AND CROSS-CLAIMS IN THE PRIVATE ACTIONS WITH CLASS CERTIFICATION WILL PROMOTE, NOT DISRUPT, THE PROCESS OF COORDINATION.

Unfairly describing the Motion to Clarify as a “disingenuous” attempt to extend the deadline for adding new parties rather than a bona fide request for clarification (Certain Private Action Plaintiffs’ Opposition at 1-2), the Opposition argues that adhering to a schedule that is keyed to class certification will “greatly disrupt this process of coordination.” (Id. at 2). First, the Banks’ Motion, in which these Certain Defendants join, truly *is* a request for clarification and

not an effort to extend deadlines. The Opposition's interpretation of the Court's Scheduling Orders would impose a *new* deadline for the joinder of parties and the assertion of third-party claims and cross-claims in the non-*Newby/Tittle* cases.

This unintended result would serve to undermine, not promote, the balanced process of coordination that the Court has crafted. The Scheduling Orders compel the conduct of merits discovery, before the ruling on class certification, but recognize that issues surrounding class certification may well impact whether some or all of the private actions proceed independently of *Newby/Tittle* at all. In the meanwhile, as the Opposition itself points out (Certain Private Action Plaintiffs' Opposition at 2), the Private Action Plaintiffs have been participating in the Deposition Scheduling Committee "to insure complete coordination of all merits discovery." (Id.). This merely serves to illustrate that the discovery procedure ordered by the Court is currently working and is not being impeded by the Court's stay of further pleadings in the private actions pending the ruling on class certification. Now requiring Defendants in the private actions to join new parties or assert third-party claims and cross-claims—before the Private Action Plaintiffs' election—would serve only to complicate unnecessarily the orderly progression of discovery. Indeed, the experience of the Private Action Plaintiffs in the discovery process prior to the ruling on class certification may well contribute to their decisions on whether or not to elect to proceed as part of *Newby/Tittle* or independently.

III. PROCEEDING IN ACCORDANCE WITH THE MARCH 11 ORDER WILL NOT SEVERELY PREJUDICE NEWLY-JOINED PARTIES.

Despite the fact that coordinated discovery has been effectively conducted to this point (including the active participation of the Private Action Plaintiffs), the Opposition expresses concern that adhering to the schedule for the joinder of new parties and assertion of third-party claims and cross-claims in the non-*Newby/Tittle* cases post-class certification will somehow

“severely prejudice” newly-joined parties. (Certain Private Action Plaintiffs’ Opposition at 3-4). First, it is highly doubtful that the interests of any new parties would not be effectively protected by the legions of lawyers currently participating in the deposition process. The facts known to the deponents are being carefully plumbed from myriad vantage points by highly capable counsel. More fundamentally, the likelihood that a number of Private Action Plaintiffs may elect to proceed under the consolidated *Newby/Tittle* actions, may well obviate the need for the joinder of some new parties or the assertion of various third-party or cross-claims. Whether and against whom to assert third-party or cross-claims likely will be affected by the decisions of the Private Action Plaintiffs on how they themselves intend to proceed. Surely potential new parties would trade their seat at an already-crowded deposition table for the possibility that deferring the decision on joinder until after class certification might result in their not being subjected to third-party or cross-claims at all. In any event, it would be anomalous for defendants in the Consolidated/Coordinated/Related cases to be forced to join new parties and file third-party and cross-claims before the Private Action Plaintiffs themselves have decided finally how and against whom to proceed. That cart should await the horse.

Accordingly, these Certain Defendants respectfully request that the Court clarify that the August 2, 2004 deadline for joining new parties, filing third-party complaints, or filing cross-claims applies only to the *Newby* and *Tittle* consolidated complaints, and does not apply to the Coordinated/Consolidated/Related Cases. A proposed form of order reflecting this requested relief accompanies this Reply for the Court’s consideration.³

³ Please see note 2, *supra*.

Dated: July 27, 2004

Respectfully submitted,

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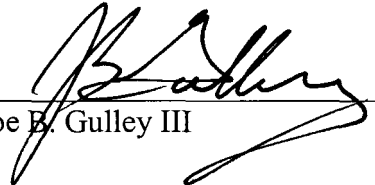
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of Certain Defendants' Reply to Certain Private Action Plaintiffs' Opposition to Motion to Clarify the March 11, 2004 Scheduling Order With Respect to Third-Party Complaints and Cross-Claims in Actions Not Proceeding Under the Consolidated *Newby* and *Tittle* Complaints was served on all counsel of record on the Service List on July 27, 2004 via posting to www.esl3624.com.



Joe E. Gulley III

In Re ENRON CORPORATION SECURITIES
LITIGATION

www

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CLASS ACTION

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Civil Action No. H-03-2257
(Consolidated with H-01-3913)

**[PROPOSED] ORDER CLARIFYING THE MARCH 11, 2004 SCHEDULING
ORDER WITH RESPECT TO THIRD-PARTY COMPLAINTS AND CROSS-CLAIMS
IN ACTIONS NOT PROCEEDING UNDER THE CONSOLIDATED
NEWBY AND TITTLE COMPLAINTS**

Upon consideration of the Bank Defendants' Motion to Clarify the March 11, 2004 Scheduling Order with Respect to the Third-Party Complaints and Cross-Claims in Actions Not Proceeding Under the Consolidated *Newby* and *Tittle* Complaints ("Motion"), in which Certain Defendants join, it is hereby

ORDERED that the Motion is **GRANTED**; and, it is further,

ORDERED that the August 2, 2004 deadline set forth in the March 11, 2004 Scheduling Order does not apply to the coordinated, consolidated and related cases not proceeding under the controlling *Newby* and *Tittle* consolidated complaints.

SIGNED at Houston, Texas, this ____ day of _____, 2004.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE